STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2006
v	No. 257098 St. Clair Circuit Court
TIMOTHY DELBERT TEICHOW, Defendant-Appellant.	LC No. 03-003005-FC

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (relationship), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b) (relationship). He was sentenced to concurrent prison terms of 120 months to 40 years for the CSC I conviction and 120 months to 15 years for the CSC II conviction. We affirm.

Defendant first argues that the trial court abused its discretion when it permitted the prosecution to amend the information to change the date of the CSC II charge relating to one of the two victims from 1993 to 1995. We disagree. This Court reviews a trial court's decision on a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An abuse of discretion occurs if the result is so contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias, or when an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling. *Id*. at 687.

MCL 767.45(1)(b), MCL 767.76, and MCR 6.112(G) and (H) set out the framework within which an information or indictment may be amended and the degree of specificity that is required to be included in an information. MCL 767.45(1)(b) provides that an indictment or information must contain "the time of the offense as near as may be." That statute further provides that "[n]o variance as to time shall be fatal unless time is of the essence of the offense." *Id*.

This Court has held that time is not of the essence, nor is it a material element, in a criminal sexual conduct case, at least where the victim is a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). As a result, pursuant to MCL 767.45(1)(b), the variance in time between the original information and the time demonstrated by the proofs, according to

which the prosecution sought to amend the information is not a bar to the amendment of the information.

In addition, defendant has failed to establish that he was unfairly surprised or prejudiced by the amendment. Prejudice occurs when a defendant does not admit guilt and is not given a chance to defend against the crime. *Stricklin, supra* at 633. However, a defendant is not prejudiced by an amendment to the information to cure a defect in the offense charged where the original information was sufficient to inform the defendant and the court of the nature of the charge. *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984).

In this case, the original information stated that the CSC II offense with which defendant was charged occurred while the victim was at least thirteen, but less than sixteen years of age, then specified "to wit: Age 13." The amendment the prosecution sought to make was to change "to wit: Age 13" to "to wit: Age 15." At the preliminary hearing, the victim testified that beginning October 19, 1993, when she was thirteen years old, defendant molested her repeatedly, touching her breasts, inserting his fingers inside her vagina, and forcing her to perform fellatio on him. She further stated that defendant continued to molest her throughout the time she was thirteen, fourteen and fifteen years of age, at a rate of one or two molestations a month. She also repeatedly testified that she could not be sure of the exact dates on which the molestations occurred.

Under these circumstances, the original information was sufficient to inform defendant and the court of the nature of the charge. The victim alleged the same type of molestations occurred when she was thirteen and when she was fifteen. Defendant did not raise an alibi defense. Although the exact date of the alleged defense changed, the specific acts making up the crime with which defendant was charged did not change, nor did the defense to the crime.

Additionally, the elements of both the charged offenses and the new offense were shown by testimony at the preliminary examination. As discussed *supra*, at the preliminary examination the victim presented evidence that defendant engaged in the same types of molestation of her repeatedly when she was thirteen, fourteen, and fifteen years old. This testimony, if believed by the factfinder, showed both the elements of the original CSC II charge and the new charge. Defendant failed to establish that he was unfairly surprised or prejudiced by the amendment. The trial court did not abuse its discretion when it granted the prosecution's motion to amend the information.

Defendant next argues that trial counsel was ineffective when she failed to move for a mistrial after a police officer testified that he "bent over backwards to try to talk to" defendant. Again, we disagree. In the present case, defendant failed to preserve his claim of ineffective assistance by filing a motion for a new trial, no *Ginther*[1] hearing was held and defendant did not make a testimonial record in connection with the claim of ineffective assistance that he raises here. Therefore, appellate review is limited to the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003).

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

This Court scrutinizes unresponsive remarks by police officers "to make sure the officer has not ventured into forbidden areas which may prejudice the defense." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). However, in general, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). "This is especially true where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction." *Lumsden*, *supra* at 299.

In the present case, the objected-to testimony was unresponsive and fleeting. Moreover, far from emphasizing the improper remark, the prosecutor agreed that a limiting instruction would be appropriate. Defendant has presented no evidence suggesting that the prosecutor knew in advance that the officer would give the unresponsive testimony or that the prosecutor conspired with or encouraged him to give the testimony. In light of the fleeting nature of the remark, the prosecution's failure to draw attention to or use this improper testimony, and defendant's refusal of a limiting instruction, we believe that defendant was not entitled to a mistrial. Trial counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Therefore, trial counsel was not ineffective in failing to move for a new trial.

Defendant next argues that the prosecutor engaged in misconduct by impermissibly shifting the burden of proof to defendant, by offering her opinion as to the credibility of defense witnesses, and by denigrating the defense and defense counsel. Once more, we disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.* A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor need not use the least

prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest terms possible. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

Defendant's assertion that the prosecutor impermissibly shifted the burden of proof is based both on the prosecutor's comments regarding the failure of two defense witnesses to come forward to the police with their exculpatory evidence, and on her comments regarding defendant's failure to authenticate online conversations discussed by defendant in cross-examination of defendant's wife and one of the victims. In a closing argument, a prosecutor may not imply that a defendant must prove something or present a reasonable explanation for damaging evidence, because such an argument improperly shifts the burden of proof. *People v Green*, 131 Mich App 232, 236-237; 345 NW2d 676 (1983). However, a prosecutor may comment upon the evidence presented at trial and upon the witnesses' credibility. *Id*. at 237. Arguments regarding the weight and credibility of the witnesses and evidence presented by the defendant do not shift the burden to the defendant to prove his innocence, but rather go to the reliability of the testimony and the evidence presented. *People v Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995). Where a defendant either explicitly or implicitly advances an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of this alternate theory does not shift the burden of proof to the defendant. *Id*. at 115.

In this case, in commenting upon the witnesses' failure to come forward to the police with exculpatory evidence the prosecutor did not imply that defendant must prove something or present a reasonable explanation for damaging evidence. Rather, she argued that these witnesses' testimony was not credible because, as each of these witnesses admitted on the stand, they did not present their allegedly exculpatory information to the police. The prosecutor was merely arguing the evidence and the reasonable inferences arising from it as they related to her theory of the case. In the process, the prosecutor was commenting upon these witnesses' credibility. Both were proper arguments. Moreover, defendant himself raised the alternate theory that he could not have molested one of the victims as alleged based on the testimony provided by these two defense witnesses.[2] As a result, the prosecutor's argument on the inferences created by this testimony was proper. *Id.* The prosecutor did not improperly shift the burden of proof when she commented on these witnesses' failure to come forward to the police.

Similarly, in commenting on the fact that the alleged online conversations had not been authenticated, the prosecutor also did not imply that defendant must prove something or present a reasonable explanation for damaging evidence. Instead, she argued that because defendant had not authenticated these conversations they lacked credibility. As stated *supra*, arguments regarding the credibility or weight of the evidence are proper. *Fields, supra* at 106-107. The prosecutor did not impermissibly shift the burden of proof when she commented on the lack of authentication for the online conversations.

Defendant's assertion that the prosecutor improperly commented on the witnesses' credibility also is based on the prosecutor's comments regarding their failure to come forward to the police with their exculpatory evidence. Inasmuch as this testimony related to the charge of

[2] He was acquitted of the charge involving that complainant.

which defendant was acquitted, this argument is essentially moot and we decline to address it further.

Defendant's assertion that the prosecutor improperly denigrated defendant and defense counsel is based on the prosecutor's comments asserting defendant was attempting to focus the jury on irrelevant details rather than on the actual facts of the case. A prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson*, *supra* at 592.

The context shows that the prosecutor clearly did not make any of these impermissible arguments. Rather, she was arguing the evidence and the logical inferences from that evidence. The prosecutor did not improperly denigrate defendant or defense counsel.

Even if in making the statements challenged here the prosecutor committed plain error, defendant is still not entitled to reversal of his convictions on this basis, because any error so made did not affect defendant's substantial rights. Defendant did not object at trial to these arguments, and the trial court did instruct the jury that the attorneys' statements and arguments were not evidence and should not be considered by the jury as evidence. *People v Hall*, 396 Mich 650, 656; 242 NW2d 377 (1976).

Finally, defendant argues that the trial court misscored Offense Variables (OVs) 5, 6, 7, and 12, and therefore imposed a sentence that departed from the statutory guidelines and which was, accordingly disproportionate. Again, we disagree. Because the crimes of which defendant was convicted were committed before January 1, 1999, the judicial guidelines apply to sentencing in this case. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). This Court reviews sentences imposed under the judicial guidelines for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

At trial the prosecution presented evidence to support the court's scoring of OVs 5, 7, and 12. Accordingly, we find that the trial court properly scored these variables. Specifically, there was evidence that defendant moved the relevant complainant to a place of greater danger to support the scoring of fifteen points for OV 5. Testimony related to the differences in defendant's and the complainant's age as well as the family trusting the complainant to be in defendant's care supported scoring fifteen points for OV 7. The complainant's testimony about multiple sexual penetrations supported the scoring of twenty-five points for OV 12.

However, the trial court erred by scoring ten points for OV 6 which concerns multiple victims. Michigan Sentencing Guidelines, (2d ed), p 44. This Court has interpreted this to mean that a sentencing court may count as victims only the victims in the charged offense. *People v Chesebro*, 206 Mich App 468, 470; 522 NW2d 677 (1994).

In the present case, although defendant was charged with acts against two different victims, the acts giving rise to the charge involving the second victim (of which defendant was acquitted) took place seven years after the acts giving rise to the charges involving the first victim. Moreover, there was no testimony that the two victims were ever present at the same

time when one of them was being molested. In light of these facts, the court should have scored OV 6 at zero points.

The total number of points assigned to defendant under the Offense Variables should have been ten points lower, making his total OV score sixty rather than seventy points. This change, however, does not change the scoring range. For any total OV score higher than fifty points, defendant would fall under offense Level IV of the judicial guidelines. Sentencing Guidelines, p 46. Coupled with a prior record level of B,[3] the scoring range is 120 to 300 months. Scoring Guidelines, pp 46-47. Defendant was sentenced within those guidelines, to 120 months to 40 years for the CSC I conviction, and to 120 months to 15 years for the CSC II conviction. Accordingly, the trial court did not abuse its discretion in sentencing defendant because his sentences are not disproportionate to the seriousness of the crimes and his prior record.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

[3] Defendant had a prior record level of B.